NO. 47804-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHRISTOPHER POMA,

Appellant.

RESPONDENT'S BRIEF

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II. STATEMENT OF THE CASE

On January 7, 2012, Courtney Grover was playing poker at the Oak Tree Casino in Woodland, Washington. The defendant, Chris Poma, and his brother were also at the Oak Tree Casino that night. At one point, all three men were in the bathroom and words were exchanged. Grover made a derogatory statement and Poma responded, "We're two faggots that are going to beat the shit out of you." RP 174. Grover "laughed it off," said

that he was not going to fight anybody, and went outside to smoke a cigarette. RP 75.

Shortly after, Poma and his brother came outside and walked toward Grover. RP 178. As they were coming toward Grover, Grover stood up. RP 178. According to a witness, Grover was swaying back and forth, had his head tilted down, and appeared drunk. RP 223. Poma and his brother "got in [Grover's] face" so Grover took a step back. RP 179. Then Poma hit Grover in the face, on the left side, and Grover went to the ground, unconscious. RP 224, 182. After Grover was on the ground, Poma got on top of him and hit him again in the head. *Id.* Grover's jaw was broken in three places, he had a chip fracture on his right shoulder, and his jaw was wired shut for nearly nine week. RP 191, 194, 294.

Poma was charged with one count of assault in the second degree. CP 1. At trial, the jury was instructed that the State had the burden of disproving self-defense. CP 36. Poma was convicted as charged and was sentenced to a standard range sentence of four months. CP 42, 48.

III. ARGUMENT

A. THE COURT PROPERLY GAVE THE "FIRST AGGRESSOR" INSTRUCTION TO THE JURY.

Poma contends that his conviction must be reversed because the trial court erred by giving the jury the first-aggressor instruction. His claim fails.

He did not object to the instruction and fails to show manifest constitutional error that actually prejudiced his rights at trial. The evidence that Poma and his brother confronted Grover outside, then Poma hit Grover out of the blue, while Grover's hands were in his pockets, he was backing up, and had his head tilted down supported the instruction. Even if giving the instruction was error, no reasonable jury could have found that Poma acted in self-defense, given the testimony from Michelle Rabideau and Courtney Grover that established Poma struck Grover before any other physical contact was made, and then struck him again after he was unconscious on the ground.

1. ***Poma waived any error.***

A defendant must generally make a timely objection to a jury instruction so that the trial court can correct any errors. *State v. Salas*, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995); CrR 6.15(c). The appellate court may refuse to review any claim of error not raised in the trial court. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97, 217 P.3d 756 (2009).

As an exception to this rule, manifest constitutional errors may be challenged for the first time on appeal if a defendant demonstrates that (1) the error is manifest, and (2) the error is truly of constitutional magnitude. RAP 2.5(a); *O'Hara*, 167 Wn.2d at 98. If an error is constitutional, it is manifest only if the defendant shows actual prejudice – meaning it is so obvious on the record that it warrants review. *O'Hara*, 167 Wn.2d at 99.

The analysis "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

Jury instructions, read as a whole, must correctly inform the jury of the law, not be misleading, and allow a defendant to present his theory of the case. *O'Hara*, 167 Wn.2d at 105. Constitutional due process is satisfied when the jury is instructed on each element of the crimes charged, and that the State has the burden to prove each element beyond a reasonable doubt. *Id.* When the defendant claims self-defense, the State must disprove it beyond a reasonable doubt. *Id.*

Poma contends that the error was constitutional because it relieved the State of its burden to disprove self-defense. He is incorrect. Because the trial court did not err in giving the first-aggressor instruction, as will be addressed below, the State was not relieved of its burden. Moreover, even if this Court were to determine that giving the instruction was error, Poma cannot show actual prejudice as a result because no reasonable jury could have found that he acted in self-defense, as will also be addressed below. This claim of error is waived.

2. *Sufficient evidence supported the first-aggressor instruction.*

A trial court's decision regarding a jury instruction is reviewed for abuse of discretion if it is based on a factual dispute. *State v. Walker*, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998). If the trial court's decision is based upon a ruling of law it is reviewed *de novo*. *Id.* To determine whether there is sufficient evidence to support giving the instruction, the reviewing court views the evidence in the light most favorable to the party that requested it. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

A first-aggressor instruction is appropriate when "(1) the jury can reasonably determine from the evidence that the defendant provoked the fight, (2) the evidence conflicts as to whether the defendant's conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon." *State v. Anderson*, 144 Wn. App. 85, 89, 180 P.3d 885 (2008), *citing State v. Riley*, 137 Wn.2d 904, 909–10, 976 P.2d 624 (1999). The State need only produce some credible evidence that the defendant was the aggressor to meet its burden of production. *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010), *citing Riley*, 137 Wn.2d at 909–10.

Here, viewing the evidence in the light most favorable to the State, the trial court did not abuse its discretion in giving the instruction. The evidence showed that Grover went outside to have a cigarette and Poma and his brother came outside shortly after. RP 175, 178. Poma and his brother got in Grover's face and asked what his problem was. RP 179. Gover, who had his hands in his pockets, took a step back. RP 180, RP 223. Poma then hit him on the left side of the face and the defendant fell down onto his right shoulder. RP 182, 191, 223. Then Poma got on top of Grover, who was passed out on the ground, and hit him at least one more time. RP 224, 245. The only evidence that indicates Poma was not the initial aggressor was his own testimony that Grover "chest-bumped" him. RP 319. However, the first-aggressor instruction is appropriate even if the evidence conflicts as to whether the defendant's conduct provoked the fight. Therefore, the trial court did not abuse its discretion in giving the instruction.

3. *Any error was harmless.*

Any error in giving the first-aggressor instruction was harmless. Erroneous use of the aggressor instruction is reviewed under the constitutional harmless error standard. *Stark*, 158 Wn. App. at 961. Giving an erroneous first-aggressor instruction is harmless if no reasonable jury could have determined that the defendant's acts constituted lawful self-defense. *Kidd*, 57 Wn. App. at 101.

In order to successfully argue self-defense, a defendant must demonstrate a reasonable apprehension of imminent harm. *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). No reasonable jury could have determined that Poma possessed a reasonable apprehension of imminent harm. The only evidence that Poma was concerned for his safety or that of his brother came from his own testimony. However, the evidence also showed that Poma got on top of Grover and hit him at least one more time when Grover was unconscious on the ground. RP 224, 245. Officer Palmquist testified that Poma was not clear about why he continued to hit Grover even after Grover was unconscious. RP 247. The evidence shows that Poma threw the first punch, unprovoked, then continued to hit Grover even after Grover was unconscious. No reasonable jury could have found self-defense in this case, so any error in giving the first-aggressor instruction was harmless.

B. THE SELF-DEFENSE INSTRUCTION THAT WAS GIVEN WAS NOT IMPROPER.

Poma argues that the self-defense instruction given to the jury was improper because it did not include language regarding the defense of others. His claim fails. An appellate court reviews jury instructions as a whole. *State v. Benn*, 120 Wn.2d 631, 655, 845 P.2d 289 (1993). "Jury instructions are sufficient when they allow counsel to argue their theory of

the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *State v. Knutz*, 161 Wn. App. 395, 403, 253 P.3d 437 (2011).

The instructions that were given in this case allowed the defense to argue their theory of the case. Instruction 16 stated that a person in entitled to act on appearances when defending himself *or another*. CP 37. Instruction 15 was the self-defense instruction; it instructed the jury that the use of force is lawful when the actor reasonable believes he is about to be injured. CP 36. Taken as a whole, these instructions allowed Poma to argue his theory of the case. In fact, the defense did argue, in closing, that Poma was defending himself and his brother when he hit Courtney Grover. He stated, "A person has the right to defend himself or another." RP 406. He also stated, "We do know that Chris Poma was trying to keep himself and his brother from getting hurt." RP 407. Because he was able to argue his theory of the case from the instructions that were given, Poma cannot show prejudice. Therefore, ineffective assistance of counsel is not shown here.

C. TRIAL COUNSEL WAS NOT INEFFECTIVE IN PROPROSING THE SELF-DEFENSE INSTRUCTION.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104

S. Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). There is a strong presumption of effectiveness that a defendant must overcome. *Strickland*, 466 U.S. at 689. To prove that counsel was deficient, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*; *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995).

The Washington Court of Appeals has devised the following test to determine whether counsel was ineffective: "After considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302 (1978), *citing State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Like the *Strickland* test, this test requires the defendant to prove that he was denied effective representation, given the entire record, and that he suffered prejudice as a result. *Id.* at 263. The first prong of this two-part test requires the defendant to show that his lawyer "failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." *State v.*

Visitacion, 55 Wn. App. 166, 173, 776 P.2d 986 (1989). The second prong requires the defendant to show "there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *Id.* Therefore, even if a defendant can show that counsel was deficient, he or she also must show that the deficiency caused prejudice.

1. ***Poma cannot show that his counsel failed to exercise the customary skills and diligence of a reasonably competent attorney by requesting the self-defense instruction that he requested.***

Looking at the entire record in this case, trial counsel gave effective representation. He requested jury instructions relating to self-defense that allowed him to argued his theory of the case. CP 35, 37. Instruction 16 specifically instructed the jury that a person may act on appearances when defending himself or another. CP 37. The defense then argued that Poma was defending himself and his brother when he hit Gover. The law was sufficiently clear to the jury from the instructions they were given, and the defense was able to argue their theory of the case. Therefore, trial counsel was not ineffective.

2. ***Poma cannot show that he was prejudiced by counsel's actions.***

In addition to overcoming the strong presumption of effective assistance, Poma must also show that he was prejudiced. Prejudice is not established unless it can be shown that "there is a reasonable probability

that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335. A reasonable probability is one that is "sufficient to undermine confidence in the outcome of the trial." *Strickland*, 466 U.S. at 694. Poma cannot show that the outcome of the trial would have been different but for his attorney's request for a self-defense instruction that did not include defense of others. The instructions that were given allowed the defense to argue their theory of the case. In fact, the defense did argue, in closing, that Poma was defending himself and his brother when he hit Courtney Grover. He stated, "A person has the right to defend himself or another." RP 406. He also stated, "We do know that Chris Poma was trying to keep himself and his brother from getting hurt." RP 407. Because he was able to argue his theory of the case from the instructions that were given, Poma cannot show prejudice. Therefore, ineffective assistance of counsel is not shown here.

D. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY TRIVIALIZING THE BURDEN OF PROOF.

First, Poma has waived a claim of prosecutorial misconduct by failing to object at trial. "A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an

admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), *citing State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). Additionally, the argument made by the prosecutor was not improper. Therefore, Poma's claims of prosecutorial misconduct were waived.

With all claims of misconduct, "the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial." *Id.* at 718, *citing State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). The court reviews the effect of allegedly improper comments not in isolation, but in the context of the total argument and the issues in the case. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Even if it is shown that the conduct was improper "prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict." *Stenson*, 125 Wn.2d at 718–19.

If the defendant objects at trial, to prove prosecutorial misconduct, the defendant must first establish that the question posed by the prosecutor was improper. *Id.* at 722, *citing State v. Brett,* 126 Wn.2d 136, 175, 892 P.2d 29 (1995). However, when the defendant fails to object, a heightened standard of review applies: "failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-

intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell,* 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *citing State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn. App. 446, 458-59, 749 P.2d 683 (1987). The rationale underlying this rule is so that a party may not "remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal." *State v. Bebb*, 44 Wn. App. 803, 806, 723 P.2d 512 (1986); *see also Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) ("If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.").

When improper argument is alleged, "the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect." *Russell*, 125 Wn.2d at 85. If a defendant – who did not object at trial – can establish that misconduct occurred, then he or she must also show that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012)

(citation omitted); *In re Pers. Restraint of Glasmann,* 175 Wn.2d 696, 704 (2012). Under this heightened standard, "[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762; *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) ("Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request."). Importantly, the absence of an objection at the time of the argument "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citations omitted).

Here, the defense did not object to the prosecution argument at trial. Therefore, he must show that a curative instruction would not have ameliorated any prejudicial effect and that there was a substantial likelihood that the statement affected the jury verdict. That is not shown here. First, while the prosecutor's remark could have confused the jury about the burden of proof, it is not necessarily incurable on that basis. *State v. Emery*, 174 Wn.2d 741, 763, 278 P.3d 653 (2012); see also *State v. Warren,* 165 Wn.2d 17, 195 P.3d 940 (2008) (prosecutor's misstatements about the burden of proof undermined the presumption of innocence but were not incurable). If Poma had objected at trial, the court could have explained the

burden of proof and reminded the jury of the instructions that had been given. An instruction from the court would have eliminated any confusion the jury may have had and cured any potential prejudice.

Furthermore, Poma does not show that there was a substantial likelihood that the prosecutor's statement affected the jury verdict. Jurors are presumed to follow the instructions that are given, and the jurors in this case were instructed to deliberate with an earnest desire to reach a proper verdict and to "decide the case for yourself but only after you consider the evidence impartially with your fellow jurors." CP 23. The prosecutor's brief statement is not likely to have changed the outcome of the trial, given the evidence presented and the jury instructions that were given. Therefore, Poma does not show that prosecutorial misconduct occurred and his appeal should be denied.

E. THERE WAS NO CUMULATIVE ERROR.

The cumulative error doctrine is limited to instances when there have been several trial errors that, standing alone, may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. Based upon the above-stated arguments, there was no cumulative error in this case.

F. THE TRIAL COURT DID NOT ERR IN IMPOSING LEGAL FINANCIAL OBLIGATIONS.

1. *Poma waived his right to object to the imposition of legal financial obligations by failing to object to*

their imposition at the time of sentencing; therefore, the court should not consider this issue.

The general rule for appellate disposition of issues not raised in the trial court is that appellate courts will not entertain them. RAP 2.5; *State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013) (citing *State v. Guzman Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011). Appellate courts can also refuse to address a RAP 2.5(a) issue sua sponte. *Id.*; *State v. Kirkpatrick*, 160 Wn.2d 873, 880 n. 10, 161 P.3d 990 (2007), *overruled in part on other grounds by State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012). In fact, this Court has previously declined to review the imposition of legal financial obligations when raised for the first time on appeal. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) ("Because he did not object in the trial court to finding 2.5, we decline to allow him to raise it for the first time on appeal."). Poma was sentenced on April 17, 2014, well after the *Blazina* case was issued. Because Poma case failed to object to the imposition of LFOs at sentencing, this Court should not review the trial court's imposition of LFOs.

2. *Even if the objection was not waived, the imposition of legal financial obligations was proper.*

Because Poma did not object at sentencing, he bears the burden of demonstrating that he can raise this issue for the first time on appeal by

showing that the sentencing court exceeded its statutory authority in assessing the LFOs. That is not shown here. RCW 9.94A.760 and RCW 10.01.160 allow a court to impose incarceration fees and service fees. There is not a distinction in the RCWs between pretrial and post-conviction incarceration for purposes of the incarceration fee, so a court has discretion to impose that fee. In this case, Poma was sentenced to four months of jail, which far exceeds the amount of incarceration fee imposed. Therefore, the imposition of the incarceration fee was not improper.

Additionally, costs imposed under RCW 10.01.160 may properly include "the sheriff's fee for service of process." *State v. Earls*, 51 Wn. App. 192, 198, 752 P.2d 402 (1988), *overruled on other grounds by State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). Therefore, the imposition of the service fee was not improper.

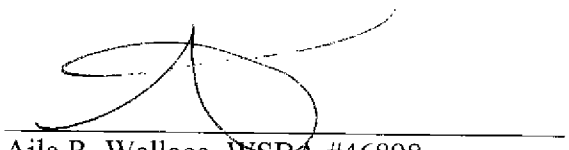
However, if this Court finds the imposition was improper, the remedy is to remand so the trial court may strike the relevant LFOs. *State v. Bertrand*, 165 Wn. App. 393, 406, 237 P.3d 511 (2011).

IV. CONCLUSION

Poma's conviction for Assault in the Second Degree be affirmed, as the jury was properly instructed, trial counsel was not ineffective, and there was no prosecutorial misconduct. This Court should not consider the issue

of LFOs, as Poma failed to object at the trial court level, precluding review on appeal.

Respectfully submitted this 14th day of April, 2016.



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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 14th, 2016.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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